

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1985-86/6
Candor Toward the Tribunal: Client Intent to Commit Perjury
June 10, 1986

RULE REFERENCES:

- *Rule 1.2(d)
- *Rule 1.6
- *Rule 1.16
- *Rule 3.3(a)(3)
- *NH Comments to Rule 3.3

SUBJECTS:

- *Candor Toward Tribunal
- *Client Communications
- *Confidentiality
- *Criminal Representation
- *Trial Conduct
- *Witnesses

ANNOTATION:

An attorney shall not knowingly permit a client to falsely testify in a trial. An attorney shall not knowingly offer evidence at trial that the attorney knows to be false, and is obligated to maintain confidentiality of information revealed to the attorney. (Rule 1.6; Rule 3.3(a)(3)).

Where a client wishes to testify falsely, at a minimum the attorney's first duty is to attempt to dissuade the client from presenting false testimony. If unsuccessful, the appropriate remedy is to withdraw from representation of the client. (Rule 3.3 with NH Comments.)

QUESTION:

Is it a violation of the Rules of Professional Conduct for an attorney to permit his client to present false testimony in order to inculcate himself to prevent his wife from being charged with a misdemeanor?

FACTS:

A truck driven by client's wife was involved in an accident. The client apparently was a passenger in the truck. The police officer arriving on the scene interrogated the client and specifically asked if he had been driving. In order to protect his wife, the client stated that he had been driving the vehicle. He was charged with DWI, second offense. The police officer did not observe the operation of the motor vehicle first hand.

RESPONSE:

It is a violation of the Rules of Professional Conduct in this situation for the attorney to permit his client to present false testimony to inculcate himself and exculpate his wife. For the purposes of this Opinion, it is assumed that the client will either testify under oath at trial or will be examined by the Judge with regard to a guilty plea. Under either circumstance, the client will either testify specifically that he was driving or it will be assumed that he was driving. For the purposes of this Opinion the situations are the same.

Rule 1.2(d) of the Rules of Professional Conduct forbids a lawyer from counseling a client to engage in conduct that the lawyer knows is criminal or fraudulent. Rule 1.16 of the Rules of professional Conduct Provides that an attorney will withdraw from the representation of a client if "the representation will result in violation of the Rules of Professional Conduct or other law." Rule 3.3(a)(3) of the Rules of Professional Conduct provides that an attorney shall not knowingly offer evidence that the lawyer knows to be false. Further if the lawyer has offered material evidence and comes to know of its falsity he shall "take reasonable remedial measures." Finally, Rule 1.6 of the Rules of Professional Conduct contains the obligation to keep confidential information revealed to the attorney by his client.

An Attorney may not permit his client to present false testimony regardless of the reason. People v. Lewis, 75 Ill.App.2d 560, 393 NE2d 1380 (1979); Philadelphia Bar Association, Opinion 81-43, BNA Lawyer's Manual on Professional Conduct, 801:7516; Michigan Bar Opinion CI-692f, BNA Lawyers' Manual on Professional Conduct, 801:4832. As the Philadelphia and Michigan Ethics Opinions suggest, the appropriate remedy for a lawyer who cannot convince his client to tell the truth is to withdraw from the case.

In Nix v. Whiteside, 106 S.Ct. 988 (1986), the Court held that the Sixth Amendment right to assistance to counsel is not violated where an attorney refused to cooperate with his client in presenting perjured testimony at trial. While the majority attempts not to constitutionalize particular standards of professional conduct and therefor intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts, Justice Burger notes that where a client wishes to testify falsely, at a minimum the attorney's first duty is to attempt to dissuade the client from the "unlawful course of conduct." Id. See NH Comments to Rule 3.3. If unsuccessful, the attorney is then authorized to withdraw from representation of his client.